

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SHIRLEY BOONE,

Petitioner,

v.

CIVIL ACTION NO. 1:04-1143

DEBORAH A. HICKEY, Warden,

Respondent.

MEMORANDUM OPINION AND JUDGMENT ORDER

I. Introduction

By Standing Order entered on July 21, 2004, and filed in this matter on October 22, 2004, this action was referred to United States Magistrate Judge R. Clarke VanDervort for submission of proposed findings and recommendation. Magistrate Judge VanDervort submitted his proposed findings and recommendation on August 8, 2005. In that Proposed Findings and Recommendation, the magistrate judge recommended that this court deny petitioner's motion for writ of habeas corpus (Doc. No. 2), deny petitioner's motion for leave of court to supplement habeas corpus (Doc. No. 9), dismiss petitioner's application (Doc. No. 1), and remove this matter from the court's docket.

In accordance with the provisions of 28 U.S.C. § 636(b), the parties were allotted ten days, plus three mailing days, in which to file any objections to Magistrate Judge VanDervort's Findings and Recommendation. The failure of any party to file such objections constitutes a waiver of such party's right to a de

novo review by this court. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140 (1985). Moreover, this court need not conduct a *de novo* review when a petitioner "makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Petitioner filed objections to the Proposed Findings and Recommendation on August 25, 2005. Because petitioner filed his objections timely, this court has conducted a *de novo* review of the record as to those objections. See 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings and recommendations to which objection is made.").

II. Analysis

Petitioner objects to the Magistrate Judge's recommendation that this court construe petitioner's application under 28 U.S.C. § 2241 as a § 2255 motion and dismiss this application for lack of jurisdiction. See Doc. No. 14. This court agrees with the Magistrate Judge's recommendation and OVERRULES petitioner's objection.

The petitioner raised five grounds for relief: (1) that the sentencing court erred in imposing sentence for Count One, (2) the sentencing court erred in imposing sentence for count two, (3) sentencing court erred by imposing a sentence in excess

of the maximum authorized by law for count three, (4) the sentencing court erred by sentencing the defendant to counts one, two, and three in violation of the Double Jeopardy clause of the United States Constitution, and (5) the sentencing court lacked jurisdiction to enter judgment. See Doc. No. 3 at 3-4. An action under 28 U.S.C. § 2255 provides the appropriate remedy for each of these actions. That provision states that a petitioner can move to vacate, set aside, or correct a sentence "imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law." See 28 U.S.C. § 2255. As the Magistrate Judge correctly noted, "[a] section 2241 petition that seeks to challenge the validity of a federal sentence must either be dismissed or construed as a section 2255 motion." See Proposed Findings and Recommendation at 4 (citing Pack v. Yusuff, 218 F.3d 448, 452 (5th Cir. 2000)). Section 2255 is the exclusive remedy unless the petitioner can demonstrate that it is inadequate or ineffective. In Re Jones, 226 F.3d 328, 333 (4th Cir. 2000).

The petitioner argues that § 2255 is inadequate, citing United States v. Pregent, 190 F.3d 279 (4th Cir. 1999). See Doc. No. 14 at 2. That case, however, does not stand for the proposition that motions attacking sentencing guidelines should be brought under § 2241. Rather, that case construed an 18

U.S.C. § 3583 motion as a § 2255 motion exactly because that was the proper procedural mechanism to attack a sentencing. See Pregent, 190 F.3d at 283. That the Fourth Circuit Court of Appeals ultimately found against Pregent's converted § 2255, does not make those petitions inadequate or ineffective. Instead, it stands for the proposition that those petitions will be granted only in exceptional circumstances. Id. Moreover, the plaintiff only marginally attacks his Sentencing Guideline application and more accurately is attacking the constitutionality of his entire sentence and the jurisdiction of the sentencing court. Therefore, this court agrees with the Magistrate Judge that petitioner's claim is more accurately framed as a 28 U.S.C. § 2255 petition.

As a § 2255 petition, petitioner's claim must be brought in the sentencing court. See 28 U.S.C. § 2255 (directing that a prisoner "may move the court which imposed the sentence . . ."). The petitioner in this case was convicted and sentenced in the Eastern District of Virginia. Accordingly, this court lacks jurisdiction to hear his § 2255 petition and OVERRULES petitioner's objections.

III. Conclusion


The court hereby (1) CONFIRMS and ACCEPTS the factual and legal analysis contained within the Proposed Findings and Recommendation submitted by the magistrate judge, (2) DENIES

Petitioner's Motion for Writ of Habeas Corpus (Doc. No. 2), DENIES petitioner's motion for leave to supplement habeas corpus (Doc. No. 9), DISMISSES petitioner's application (Doc. No. 1) with prejudice in consideration of its lack of jurisdiction and without prejudice as to the merits of the claims raised therein, and REMOVES this matter from the court's docket.

The Clerk is directed to remove this matter from the active docket of the court, and is further directed to forward a certified copy of this memorandum opinion and judgment order to counsel of record and to the petitioner.

IT IS SO ORDERED this 29th day of September, 2005.

ENTER:

A handwritten signature in cursive script, reading "David A. Faber", is written over a horizontal line.

David A. Faber
Chief Judge